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OCT 9 1971

Case No. 71-160

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

LEVIN SERVICE CO., et al.,
Petitioners,

v.

DAVIDSON EXCAVATING, INC.,
Respondent.

REPLY BRIEF OF PETITIONER ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

JACOB A. MYERS, Esq.
820 Gem City Savings Building
Dayton, Ohio 45402

IRVING I. SAUL, Esq.
536-111 West First Street Building
Dayton, Ohio 45402
Attorneys for Petitioners

ROBERT C. ALEXANDER, Esq.
367 West Second Street
Dayton, Ohio 45402
Attorney for Respondent

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

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REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent's "Statement of the Case", through its choice of terms, appears to give the misleading impression that it delivered various building materials for the construction of a theatre site.

In fact, it simply delivered and dumped only one item, fill-dirt, on a field.

Respondent's statement that controversies arose almost immediately is also misleading and not supported by the record. No controversies arose until the very end of the job, when Respondent refused to accept the results of an engineering survey which determined that 173,000 yards of fill-dirt had been delivered. This is borne out by the

record which shows that all bills were hand-presented by Respondents, under claim of pressing financial obligations, and were paid promptly, on each occasion up to the final phase of the job. Only when Respondents demanded payment for alleged delivery of fill-dirt in excess of that found to have been delivered by the engineering survey, was payment refused, and the controversy arose.

Although the written contract provided that measurement of the number of cubic yards of fill-dirt delivered was to be determined by engineering survey, Respondents refused to accept the results of the final survey by the registered engineers. Respondent thereupon employed its own engineer to make the survey at the conclusion of the job. It refused to reveal the results of this survey.

Thus the controversy came to a head.

Respondent thereupon filed suit, claiming payment due for 34,000 yards of fill-dirt in excess of that shown to have been delivered by the engineering survey. It did not claim the engineering survey was in error. Instead, it claimed for the first time that the engineering survey was no longer applicable. It is significant that this claim was first made only after consulting with their legal counsel following the conclusion of the work. It claimed after such consultation, that the survey method of measurement (under the written contract) had been superseded by an oral agreement, which determined the amount of fill-dirt delivered, by merely counting the truck deliveries, by its own employees.

No billings were ever made by the number of truck deliveries, nor was there any change in the method of billings, from the inception of the work to its conclusion, to indicate any such change.

The survey method of measurement also was employed from the inception of the job, to its conclusion. The final

results of the survey were checked by Respondent's own engineer, who declined to disclose his results at the trial.

Nevertheless, the jury disregarded the results of the survey by the registered engineers, and brought in a verdict for 34,000 more cubic yards of fill-dirt than that shown to have been delivered by the engineering survey.

The verdict was against Sam Levin, Louis Levin and Levin Service Co., jointly and not severally. The only party to the written agreement was Sam Levin, individually, who was an officer of Sheridan Theatre, Inc., the owner of the theatre.

Louis Levin was an officer of Sheridan Theatre Inc., the corporate owner, and was supervising the work for the owner. There was no evidence to the contrary. He had no monetary investment or interest in the theatre, or its construction. He received a salary from the owner, Sheridan Theatre Inc.

Levin Service Co. was an accounting firm which was employed to do accounting work for the owner, Sheridan Theatre Inc. It issued its checks on behalf of Sheridan Theatre Inc., for which it was reimbursed. It had no other nexus to the work. It was not a party to the contract, and had no investment or interest in the construction of the theatre or the land.

The Court of Appeals was unable to find joint liability on the part of Levin Service Co. or Louis Levin as joint principals or as partners.

It did so only by adopting a theory of "joint enterprise" to hold them liable. The jury was not charged upon this theory of liability, nor was such ground of liability pleaded. It was not submitted or argued by either party in their briefs to the Ohio Court of Appeals, nor orally argued in the Ohio Court of Appeals. It has never been defined by the Ohio Supreme Court.

REPLY TO RESPONDENT'S ARGUMENT OPPOSING JURISDICTION

The authority cited by the Ohio Court of Appeals to support its theory of "Joint Enterprise", is in fact contrary to its holding. This authority, 31 Ohio Jurisprudence 2d 317-331, Joint Adventures, Sec. 1-15, states that this theory (Joint Enterprise) is not normally employed in reference to a business relationship comparable to a partnership. It has been defined as an undertaking for the mutual benefit or pleasure of the parties, as a result of which the negligence of one participant may be implied to another. 30 American Jurisprudence 940, Joint Adventures, Sec. 2.

The Court of Appeals declined to define this theory of liability, and instead, in its opinion, referred the reader to an entire chapter of 31 Ohio Jurisprudence, 317-331, Joint Adventures, Sec. 1-15.

Respondents argue that Petitioners were not denied due process of law even though the jury was not charged on the doctrine of "joint enterprise" under which theory alone the Court of Appeals found joint liability to rest. It also argues that Petitioners were not denied due process of law, even though no such theory of liability was pleaded. It ignores the fact that no such theory of liability was argued in the Court of Appeals, nor defined by the Supreme Court of Ohio, it argues that the theory of mutual joint liability was upheld, but it ignores the fact that it was upheld under a theory of "Joint Enterprise" upon which the jury was not charged.

Respondent argues that the Court of Appeals found ample evidence that Louis Levin and Levin Service Co. were "*jointly involved*" and therefore jointly liable.

The Court of Appeals found that the "joint involvement" referred to by Respondents was not sufficient to constitute

joint liability except under a theory of "Joint Enterprise" which it adopted for the first time. This doctrine was supported by citation to a whole chapter of a law digest.

We quote the language of the Court of Appeals,

> "Under the circumstances shown here, we conclude that the trial court correctly determined that Levin Service Co., Louis Levin and Sam Levin were engaged in a joint enterprise as that term is described in 31 Ohio Jurisprudence 2d, 317-331, Joint Adventures, Section 1-15."

This language is found at page 25, Appendix Petitioners Brief for Writ of Certiorari.

The language found in the above paragraph that "the trial court correctly determined that Levin Service Co., Louis Levin and Sam Levin were engaged in a joint enterprise" is unfortunately without foundation. The verdict was by a jury, not by the trial court. The only opinion rendered by the trial court occurred in overruling petitioner's motion for a new trial, and for judgment notwithstanding the verdict. No such language or theory appeared therein, nor was this theory of liability pleaded. See Appendix, pages 17-19 of Petitioner's Brief for Writ of Certiorari, for this opinion.

The jury was not instructed in any manner on this theory by the trial court, nor were any such instructions submitted by either side.

This theory of liability appeared nowhere in the briefs of either side, filed with the Court of Appeals. It adopted this theory without requesting briefs or argument, by either side. Further, the law digest to which it referred to justify its use of the theory, [to find joint liability] holds that it is properly employed solely in negligence actions and is inapplicable to contract liability.

Respondent's sole argument on this issue is by way of character assassination. He argues that the raising of the issue of denial of due process herein, is the "manufacture (of) an excuse for a further appeal of this case" after the denial of the appeal [without hearing] by the Supreme Court of Ohio.

We submit this is hardly an argument befitting a brief to this court. Respondent is entirely silent and submits no argument on the question of the "joint enterprise" doctrine adopted by the Court of Appeals to sustain the verdict of joint liability, and resorts solely to an attack on the character of petitioners counsel, by claiming the appeal is "a manufactured excuse" to appeal this cause.

CONCLUSION

It is undeniable that Petitioners were denied their right to a fair trial under due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution. It is fundamental that a trial by jury requires that the jury be instructed on the issues under which Petitioners liability was found to exist. This was not done here.

We submit that due process of law requires that Petitioners be given notice under the pleadings so that it may make every proper defense. This was not done here. The pleadings did not allege in any manner a claim of liability by reason of an allegation of joint enterprise.

We submit that due process of law is denied, where on appeal, a new theory of liability (joint enterprise) is employed by the Court of Appeals to sustain the liability of petitioners, which under the pleadings and trial pursuant thereto, petitioners were not called upon to meet

in the trial court. *Virginia Railway Co.* v. *A. J. Mullen,* 271 O.S. 220, 70 L. Ed. 915, 46 S. Ct. 526 (1926).

We respectfully submit this cause should be remanded to the Supreme Court of Ohio for a hearing and opinion on the issue of the denial of due process of law, under a theory of liability never defined by that court in a contract action. The Ohio Supreme Court rendered no opinion, and refused jurisdiction on the ground that no substantial constitutional question existed.

Certainly the rights of petitioners under the Fourteenth Amendment to the Federal Constitution should not be disregarded and trampled upon by reason of the press of other matters considered to be more important on the docket of the court below.

The injustice here is patent. The Constitutional safeguards of the Fourteenth Amendment of a trial by jury under due process of law should not be permitted to be ignored by the highest State Courts below.

Respectfully Submitted,

JACOB A. MYERS
IRVING I. SAUL
Attorneys for Petitioners